Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1825

SARAH A. ARTHUR, ET AL.,

Appellants,

vs.

CLAY COMMUNITY SCHOOLS, ET AL.,

Appellees.

ROY TOLIN, ET AL.,

Appellants,

vs.

SOUTHWEST PARK COMMUNITY SCHOOL CORPORATION, ET AL.,

Appellees.

APPEAL FROM THE SUPREME COURT OF INDIANA.

MOTION TO DISMISS APPEAL FROM STATE COURT.

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INDEX.

	PAGE
Introduction	1
I. Statement of the Proceedings Below	3
II. Questions Presented for Review	5
III. Summary of Argument	5
IV. Argument	6
1. The Failure to Raise Federal Constitutional Questions in the State Courts	6
2. The Decision of the Court of Appeals of Indiana Is Clearly Correct and No Substantial Federal Question Is Presented in This Appeal	8
Conclusion	18
Appendix	A1-A13

CITATIONS.

Cases.

Chidsey v. Guerin, 433 F. 2d 584 (6 Cir. 1971)	14
Lindsey v. Normet, 402 U. S. 56, 92 S. Ct. 862, 31 L. Ed. 2d 36 (1972)	12, 16
National Union of Marine Cooks & Stewards v. Arnold, 348 U. S. 37, 75 S. Ct., 99 L. Ed. 46 (1954)	12
Newman v. Gates, 27 S. Ct. 220, 204 U. S. 89, 51 L. Ed. 385 (1907)	16
O'Day v. George Arakelian Farms, Inc., 506 F. 2d 855 (9 Cir. 1976)	14
Ortwein v. Schwob, 410 U. S. 656, 35 L. Ed. 2d 572, 93 S. Ct. 1172	15

Saloom v. Holder, 158 Ind. App. 177, 304 N. E. 2d 217 (1973) 8

Sekerez v. Board of Sanitary Commissioners, 261 Ind. 398, 304 N. E. 2d 533 (1973) 9

State ex. rel., Haberkorn v. DeKalb Circuit Court, 251 Ind. 283, 241 N. E. 2d 62 (1968) 10, 12

State of Indiana on the Relation of the Board of Sanitary Commissioners of the City of Terre Haute, Indiana, etc. v. Superior Court of Vigo County, etc. (1966), 9 Ind. Dec. 233, 220 N. E. 2d 336 10

Suess v. Vogelgesang, 151 Ind. App. 631, 281 N. E. 2d 631 (1972) 8

Warren v. Indiana Telephone Company, 217 Ind. 93, 26 N. E. 2d 399 (1940) 15

STATUTES AND RULES.

Indiana Code:

21-5-11-1 through 21-5-11-16 3
21-5-12-1 through 21-5-12-11 3
21-5-12-7 ..... 5, 6, 7
34-4-17-1 through 34-4-17-8 ..... 2, 3
34-4-17-5 ..... 4, 5, 7, 8
34-4-17-8 3

United States Code:

28 U. S. C. Section 1257(2) 5
28 U. S. C. Section 1257(3) 2, 5

Indiana Rules of Appellate Procedure 11

Indiana Rules of Civil Procedure 11

Supreme Ct. Rule 18 11

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The Appellee, Clay Community Schools, moves the Court to dismiss the attempted appeal herein, or in the alternative, to affirm the Order of the Supreme Court of Indiana on the following grounds:

1. The Federal questions sought to be reviewed were neither timely nor properly raised or expressly passed on by the courts of Indiana.

2. The appeal does not present a substantial Federal question.

3. The Federal questions on which the decision of the case depends are so unsubstantial as not to need further argument.

Appellants request the Court to treat this matter as a Petition for Writ of Certiorari should it be determined that it is not properly presented as an appeal. The Appellees respectfully submit that the appeal jurisdiction of this Court does not extend to an action of this nature. The decision below is reviewable, if at all, by Writ of Certiorari. 28 U. S. C. Section 1257(3). Accordingly, the appeal should be dismissed and, treating the papers as an application for a Writ of Certiorari, the Writ should be denied.

Appellants challenge the decision of the Indiana Court of Appeals dismissing their appeal for failure to post bond as authorized by the Indiana Public Lawsuits Act. (I. C. 34-4-17-1 through 34-4-17-8, Title 34, pages 776 through 781.) Appellants after being given the opportunity to show cause why bond should not be posted were ordered to file a bond or suffer dismissal of their appeal. Appellants chose not to post the bond and thereafter filed a Petition for Rehearing with the Indiana Court of Appeals and a Petition to Transfer with the Indiana Supreme Court, which were denied. (App. IV and VIII of Appellants' Jurisdictional Statement.)

Appellants have sought to consolidate these Appellees' action (referred to in Appellants' Jurisdictional Statement as the "Clay School case") with another public lawsuit in another Indiana county wherein Appellants' counsel suffered a similar fate. Appellee's Motion is addressed only to the case involving Clay Community Schools since counsel lacks knowledge of the manner in which questions were raised in the case where their client was not a party (referred to in Appellants' Jurisdictional Statement as the Parke School case").

Appellants' efforts to consolidate these actions in the Indiana appellate courts were refused. There are a number of obvious distinctions between the cases. For instance, the lease agreements subject to review in the respective cases were authorized by separate and distinct Indiana statutes. The lease agreement in the Clay School case was authorized under the Private Schoolhouse Building Statute (I. C. 21-5-12-1 through I. C. 21-5-12-11, Title 21, pages 492 through 497) while the Parke School case was pursued under the Public Schoolhouse Building Statute (I. C. 21-5-11-1 through 21-5-11-16, Title 21, pages 479 through 491); (see Appellants' Jurisdictional Statement, Section VI). A more important distinction may be found in the manner in which certain questions have been raised. In spite of assertions in Paragraph 2 of Section VI of Appellants' Jurisdictional Statement, no Specific Assignment of Errors was filed by Appellants in the Clay School case.

For the reasons cited, Appellees object to any consolidation of these appeals.

I. STATEMENT OF THE PROCEEDINGS BELOW.

This case originated as an action under the Public Lawsuits Act of Indiana (I. C. 34-4-17-1 et seq.) initiated by a complaint filed in the Clay Circuit Court, Clay County, Indiana, on July 1, 1977, one of three public lawsuits initiated to contest the adopted building program of Clay Community Schools in spite of I. C. 34-4-17-8, which provides that only one such lawsuit is permissable. The principal defendants consisted of Clay Community Schools, Indiana State Board of Tax Commissioners, and Clay Community School Building Corp. A four-day interlocutory hearing was held before the trial court commencing October 24, 1977, in response to Appellees' Motion

to Dismiss under I. C. 34-4-17-5. On November 14, 1977, the trial court entered its Findings of Fact and Conclusions of Law (App. I) requiring Appellants to post bond in the sum of Nine Hundred Twenty-six Thousand Six Hundred Ten Dollars ($926,610.00) or have their suit dismissed.

Thereafter, Appellants filed a Praecipe for the Record and a Petition for Extension of Time Within Which to File Record of Proceedings with the Court of Appeals of Indiana (First District) requesting until January 16, 1978, to file such transcript. Appellees filed Objections to the Request for Extension of Time, a Petition for Advancement, and a Petition for an Order That Appeal Be Dismissed Unless Bond Is Posted. On November 23, 1977, the Court of Appeals issued an Order that Appellants show cause why bond should not be posted. After allowing Appellants the opportunity to show cause, the Court of Appeals issued an order dismissing the appeal because of Appellants' failure to post said bond.

Appellants thereafter filed two Petitions for Rehearing with the Court of Appeals of Indiana, one was premature, and the second was denied on February 27, 1978. Thereafter, Appellants filed their Petition to Transfer with the Indiana Supreme Court which was also denied. On the 11th day of April, 1978, Appellants filed Notices of Appeal to the Supreme Court of the United States. Appellants on June 23, 1978, filed a Jurisdictional Statement appealing the Indiana Supreme Court decision with this Honorable Court.

The uncontroverted evidence was that Appellees (Clay School case) cannot proceed with their adopted building program as long as this litigation is pending and that Appellees have already lost in excess of Nine Hundred Twenty-six Thousand Six Hundred Ten Dollars ($926,610.00) due to inflation. The trial court's Findings of Fact and Conclusions of Law, along with the record in the Court of Appeals of Indiana clearly show that Appellees have properly initiated a building program and received favorable rulings from all administrative agencies and

courts in Indiana, yet they cannot proceed because of the pendency of this appeal, all to the detriment of Appellees, the students, citizens, and taxpayers of Clay Community Schools.

II. QUESTIONS PRESENTED FOR REVIEW.

1. Where Appellants did not raise the issue of the validity of Indiana statutes, I. C. 34-4-17-5 of the Indiana Public Lawsuits Act and I. C. 21-5-12-7 of the Indiana Private School House Leasing Act in the State appellate courts below and where the orders of such courts do not mention, discuss or pass on such question, does the jurisdiction of the United States Supreme Court attach on appeals?

2. Where a state appellate court requires Appellant to comply with a trial court order to post bond or suffer dismissal of their appeal, as authorized by statute, and where the bond required is in the exact sum shown by uncontroverted evidence to be the damages sustained by Appellees during the appeal process, is there a substantial Federal question involved?

3. Whether the order of dismissal by the Indiana Court of Appeals of Appellants' appeal without a statement in writing of each question arising on the record presents a substantial Federal question invoking the jurisdiction of the United States Supreme Court?

III. SUMMARY OF ARGUMENT.

The Appellants' Jurisdictional Statement attempts to invoke this Court's jurisdiction pursuant to 28 U. S. C. Section 1257(2). Appellees would respectfully show this Honorable Court that the Appellants challenge the validity of a State statute and claim their right to appeal has been denied. The Appellants' claim of jurisdiction would be more properly presented by a Writ of Certiorari pursuant to 28 U. S. C. Section 1257(3). In any event, Appellees submit that the Federal questions sought to be reviewed concerning the validity of Indiana statutes

were not properly raised in the State appellate courts and that Appellants have not raised a substantial Federal question on any of the questions presented. The rights of a court to impose a bond as a condition precedent to the perfection of an appeal is well established by the rulings of this Honorable Court and there is plainly no need for further review.

IV. ARGUMENT.

1. The Failure to Raise Federal Constitutional Questions in the State Courts.

Appellants assert in their Jurisdictional Statement that they have adequately raised the issue of the constitutionality of I. C. 21-5-12-7 by certain allegations in their amended complaint. They further assert the same constitutional questions were raised in a Specific Assignment of Errors Alleged which was purportedly filed in the Court of Appeals of Indiana. There was no Specific Assignment of Errors Alleged filed in the Clay School case. The Appellants by this action merely appealed an order of the Indiana Court of Appeals requiring a bond as a condition precedent to the continuation of the appeal, not the decision of the trial court wherein the amended complaint was filed. Therefore, no question was properly raised before the Indiana appellate courts concerning the validity of I. C. 21-5-12-7.

Though Appellants, in their amended complaint, attacked I. C. 21-5-12-7 as violating the Federal Constitution on the ground that the statute precluded judicial review, they then proceeded to appeal the ruling of the State Board of Tax Commissioners before the trial court, naming the Board as parties to the suit under the Indiana Public Lawsuits Act. The trial court heard evidence of the Appellants on a variety of subjects, including the effect of the Appellees' building program on the tax rate, before rendering its decision. The chairman of the State Board of Tax Commissioners was called as a witness and the findings of the State Board of Tax Commissioners were

offered into evidence. The trial court then entered the following Findings of Fact, in part:

> "17. The lease-rental remonstrance hearing was held in Brazil, Indiana, on July 18, 1977, and was conducted by a hearing examiner of the Defendant Indiana State Board of Tax Commissioners. At said hearing, persons spoke both for and against the executed lease. The hearing examiner found and reported to the State Board of Tax Commissioners that there is a definite need for new high school facilities and that the lease rental agreement is fair and reasonable and that he recommend approval of the lease rental agreement.
>
> 18. Thereafter, the Defendant Indiana State Board of Tax Commissioners, by order dated August 29, 1977, and corrected September 6, 1977, approved the lease rental agreement between Defendant Clay Community School Building Corp. and Clay Community Schools. There is no evidence the Indiana State Board of Tax Commissioners did not act reasonably and lawfully in approving this lease."

The Indiana Public Lawsuits Act is clearly a statutory vehicle for Appellants to secure judicial review of the final decision of the Indiana State Board of Tax Commissioners under I. C. 21-5-12-7. Therefore, the question of the constitutionality of that statute was rendered moot at the trial court level and, in any event, was not raised. mentioned, or passed on by the Court of Appeals of Indiana or the Supreme Court of Indiana.

Appellants did not preserve the issue of the validity of I. C. 34-4-17-5 concerning the bond required by the Indiana Court of Appeals as is shown by their Petition for Rehearing and Petition to Transfer attached to their Jurisdictional Statement as App. IV & VIII. Appellants' sole attack was upon the "order" of the Court of Appeals of Indiana and not upon the validity of the Indiana Public Lawsuits Act.

Section VI of Appellants' Jurisdictional Statement is void of any reference to the issue of the constitutionality of I. C.

34-4-17-5. Each time Appellants discussed the bond established by the Court of Appeals of Indiana, they raised the issue in the context of the Court of Appeals' application. Until the submission of Appellants' Jurisdictional Statement, the validity of I. C. 34-4-17-5 has never been raised in this case.

On the aforegoing facts, it is beyond doubt that the question sought to be reviewed is not now before this Honorable Court. The Indiana Court of Appeals, like most other appellate courts, has consistently and uniformly held that any contention on behalf of an appellant not raised in that court may be deemed abandoned and need not be considered. *Saloom* v. *Holder*, 158 Ind. App. 177, 304 N. E. 2d 217 (1973). *Suess* v. *Vogelgesang*, 151 Ind. App. 631, 281 N. E. 2d 631 (1972).

2. The Decision of the Court of Appeals of Indiana Is Clearly Correct and No Substantial Federal Question Is Presented in This Appeal.

The order of dismissal of the Indiana Court of Appeals was pursuant to I. C. 34-4-17-5 which provides as follows:

> Interlocutory hearing—At any time prior to the final hearing in a public lawsuit, the defendant may petition for an order of the court *that the cause be dismissed unless the plaintiff shall post a bond with surety to be approved by the court payable to defendant for the payment of all damages and costs which may accrue by reason of the filing of the lawsuit in the event the defendant prevails.* A hearing shall be had on such petition in the same manner as the hearing on temporary injunctions under IC 1971, 34-1) formerly Acts 1881 (Spec. Sess.), ch. 38). If at the hearing the court determines that the plaintiff cannot establish facts which would entitle him to a temporary injunction, *the court shall set the amount of bond to be filed by the plaintiff in an amount found by the judge to cover all damages and costs which may accrue to the defendants by reason of the pendency of the public lawsuit in the event the defendant prevails.* In the event such bond is not filed by the plaintiff with sureties approved by the

> court within ten (10) days after such order is entered the suit shall be dismissed. Either plaintiff or defendant may appeal such order to the Indiana Supreme Court within such ten (10) day period by notice of appeal and a statement of error in the same manner as is provided in a petition for mandate or prohibition. The Supreme Court may stay the lower court order pending its own decision, *may set a bond to be filed by the plaintiff in connection therewith,* may modify the order of the lower court, or may enter its order as a final order in a case. *In the event no bond is filed as provided in this section, the public lawsuit shall be dismissed and no court shall have further jurisdiction of the public lawsuit or any public lawsuit involving any issued which was or could have been raised therein.* Provided, That nothing in this section is intended to create nor shall it be construed as creating, any additional cause of action on the part of any municipal corporation, person, partnership, or corporation, unless the defendant is required to and does post bond. (Emphasis supplied.)

The language of the above section of the Public Lawsuits Act makes the requirement of a bond discretionary with the Court of Appeals when that court is asked by appellants to review a trial court order requiring them to post bond or suffer dismissal of their suit. The Indiana legislature sought to grant the power to compel a bond not only to the trial courts of the State but to the Supreme Court of Indiana as well. The Indiana Supreme Court, in turn, acting under its rules, granted the power to the Court of Appeals. See *Sekerez* v. *Board of Sanitary Commissioners,* 261 Ind. 398, 304 N. E. 2d 533 (1973).

In the case at bar, the Court of Appeals exercised its discretion under the Public Lawsuit Act to require the bond to be filed in connection with the appeal process. The bond required under the statute is not an appeal bond in the sense that the term is used in the Indiana Rules of Civil Procedure and the Appellate Rules of Indiana. An appeal bond is given to guarantee payment of a judgment or obligation if the appellant fails to

prevail in order that the appealing party can forestall execution on the judgment or order while the appeal is in process. If execution is not forestalled or suspended during the appellate process, there would be nothing left to appeal after execution is had and the judgment satisfied. On the other hand, the bond permitted under the Indiana Public Lawsuit Act was obviously provided for by the legislature to create a fund from which the public could be protected for damages which it might sustain as a result of a frivolous lawsuit and any subsequent appeals. Appellants decided that they would rather not post the bond in order to obtain a stay of the operation of an adverse judgment. Instead, they have permitted their case to be dismissed and seek to resurrect it through the appellate process. Under the Indiana Public Lawsuits Act, Appellants were permitted to present four days of evidence in order to raise a "substantial question on a single issue". The application of the Indiana Public Lawsuits Act by the Court of Appeals represents a fair balance of the rights of the taxpayers to question public action, on the one hand, and the right of the public at large to be kept harmless from frivolous, unwarranted or malicious actions on the other. This balancing of rights was discussed at length by the Supreme Court of Indiana in the case of *State ex rel, Haberkorn* v. *DeKalb Circuit Court,* 251 Ind. 283, 241 N. E. 2d 62 (1968) which recognized the need for modern judicial responsiveness to current problems facing governmental units developing public projects. The Indiana Supreme Court in discussing Section 5 of the Public Lawsuits Act in that case stated:

> The courts have properly permitted any citizen or taxpayer to file some suit to keep a public official within his statutory duties. See *State of Indiana on the Relation of the Board of Sanitary Commissioners of the City of Terre Haute, Indiana, etc.* v. *Superior Court of Vigo County, etc.* (1966), 9 Ind. Dec. 233, 220 N. E. 2d 336. In this case this court held that the law permits persons claiming to be aggrieved to come into the trial court and ask for injunction or other equitable remedies against administrative action where no statutory or administrative procedure provides for a final judicial review or appeal. The court likewise stated that this court cannot arbitrarily bar the filing of lawsuits or the continuation of the same because the party being sued thinks the lawsuit is unfair, a hardship, or without merit. Those are issues that have to be tried in the trial court, including the issue of harassment. The court cannot arbitrarily take from a taxpayer the long established right to question the action of public officials in borrowing funds and spending such public funds.

There has been no effective legislation which could give the majority of the citizens a correlative remedy, so that necessary public projects, where legally proper, may be carried out as planned with protection against harassing lawsuits.

It is true under the state law prior to adoption of Chapter 357, a determined plaintiff could keep a suit in being from two to six years; and in many cases the mere filing of the action delayed beyond saving the intricate planning of the project regardless of the merits of the action.

> If litigation is filed and a legal opinion cannot be given, bonds will remain unsold or undelivered. If this persists for any project for more than six months to a year, construction contractors in inflationary times cannot stand by their bids, and the project as planned and the litigation opposing it become moot. In the meantime taxpayers, in those cases where the endeavor is legally correct, have suffered substantially by increased construction costs. 241 N. E. 2d at 65-66.

Appellants assert that the mere requirement of a bond deprives them of their right to appeal. It should be noted that the Indiana Rules of Civil Procedure, the Indiana Rules of Appellate Procedure and Rule 18 of the United States Supreme Court Rules authorize bonds pending appeal and require their use in order to suspend the enforcement of a judgment or order. In the present action, Clay Community Schools' building program would be well on the road to completion but for the existence of the present appeal. The mere existence of an appeal

operates as a temporary injunction against Clay Community Schools in that bonds cannot be sold while there is pending litigation as noted in *State ex rel. Haberkorn* v. *DeKalb Circuit Court, supra.*

The only real question presented in this appeal is whether the Indiana Court of Appeals properly applied the provisions of the Indiana Public Lawsuits Act by requiring the Appellants to post bond in order to perfect their appeal. Appellants further allege they were not financially able to post such a bond and their appeal was dismissed without a written opinion. Appellees submit that these issues present no substantial Federal question.

Appellants assert that this Court's decision in *Lindsey* v. *Normet,* 402 U. S. 56, 92 S. Ct. 862, 31 L. Ed 2d 36 (1972) support their position. In *Lindsey,* this Court struck down an Oregon statute requiring appellants to post a "double bond" in order to pursue an appeal. The rationale was clear: an appellant should not be subjected to an automatic assessment of unproven damages not rationally related to securing the risks involved. The *Lindsey* decision, instead of disapproving bonds of the sort ordered in the present action, specifically authorized such procedural safeguards. The court therein stated:

> We do not question here reasonable procedural provisions to safeguard litigated property, cf. *National Union of Marine Cooks & Stewards* v. *Arnold,* 348 U. S. 37, 75 S. Ct., 99 L.Ed. 46 (1954), or to discourage patently insubstantial appeals, if these rules are reasonably tailored to achieve these ends and if they are uniformly and nondiscriminatorily applied. Moreover, a State has broad authority to provide for the recovery of double or treble damages in cases of illegal conduct that it regards as particularly reprehensible, even though posting an appeal bond by an appellant will be doubly or triply more difficult than it otherwise would be. 92 S. Ct. at 877.

The bond imposed in the instant case was based solely and directly upon losses to be incurred by Appellee, Clay Community Schools, during the pendency of the appeal through the

State courts without any consideration for such supplementary factors as additional attorney fees. There is no assertion here that Appellants were being requested to post a bond which would subject them to unproven damages. The Indiana Court of Appeals required the same bond as set by the trial judge in the Clay Circuit Court below. The evidence supporting the bond amount was clear, unequivocal, and uncontroverted. The trial court in its Findings of Fact stated as follows:

> 22. Construction of the new building program has not commenced because of the pendency of this lawsuit brought by the petitioners in this cause. Defendants will not be able to commence construction until such time as this lawsuit is finally disposed of and the legality of the actions of the public officials finally determined. However, during this period of delay, the uncontradicted evidence shows the costs of construction have risen and will continue to rise. For example, from January 29, 1977 to September 1, 1977, a period of eight (8) months, construction costs alone for the building project, for both the Defendant Clay Community Schools and the Defendant School Corporation, have risen $509,578.
>
> 23. The uncontradicted evidence shows that if the lawsuit had not been filed, construction would have started following the approval of the lease by the Indiana State Board of Tax Commissioners, subject, however, to rebidding the School Board portion of the work. Construction would have commenced by November 1, 1977, at the latest. The uncontradicted evidence shows that a period of five months, or until April 1, 1978, is a reasonable estimate of the time required to conclude a lawsuit of this nature, and any attendant appeal. Based on written commitments received from contractors who have obligated themselves to construct their portion of the work at a prescribed figure set forth in the evidence, construction costs will increase $359,669 from November 1, 1977, to December 31, 1977; an additional $276,708 from January 1, 1978, to February 28, 1978; and an additional $290,233 from March 1, 1978, to April 1, 1978.
>
> 24. The uncontradicted evidence shows that the cost to construct the school building program, if commenced by

November 1, 1977, would increase $926,610, if construction is delayed until April 1, 1978.

The Appellants also cite the case of *O'Day* v. *George Arakelian Farms, Inc.*, 536 F. 2d 855 (9 Cir. 1976) involving a statutory double bond requirement. This case further supports the type of bond invoked herein by the Indiana Court of Appeals. That decision merely invalidated the bond requirement to the extent it required a "double bond". The two cited cases merely emphasize that the questions presented by Appellants herein are not only unsubstantial but have been previously addressed by this Court. (See also *Chidsey* v. *Guerin*, 433 F. 2d 584 (6 Cir. 1971).) Appellants claim that their Fourteenth Amendment rights have been violated because of the bond required by the Indiana Court of Appeals. If any rights have been violated, it is those of the citizens and taxpayers of Clay Community Schools by the pendency of this litigation where Appellants were given the opportunity in a four-day hearing to merely raise a substantial question on a single issue. If Appellants had been successful, bond would not have been required. Having failed to raise such a question, it was the determination of the trial court and subsequently the Indiana Court of Appeals, after review pursuant to its Rule to Show Cause, that the litigation was without merit. Therefore, if Appellants desired to continue such litigation, the Indiana Court of Appeals ordered they would have to post bond to protect the citizens and taxpayers of Clay Community Schools. The existence and size of the bond was determined pursuant to statute merely to maintain the status quo, no more, no less. By merely pursuing this appeal since November 14, 1977, Appellants, without posting any bond, have cost the taxpayers of Clay Community Schools over $1,000,000.00, money which will be lost even if this appeal is dismissed. The mere existence of this appeal has prevented bond counsel from rendering an unqualified approving opinion. Appellees dilemma, without recourse, is very real. It began the day this action was filed and has continued even though Appellants have failed to sustain their burden of proof by raising a substantial question on a single issue.

Appellants allege a denial of equal protection if appellants of interlocutory orders are required to post bond. In this case, the Indiana Court of Appeals required the posting of bond only after Appellants had been given an opportunity to show cause why said bond should not be posted. The Equal Protection Clause of the Fourteenth Amendment does not require that all Appellants in Indiana may appeal without the necessity of posting bond. Appellants would attempt to establish a class of all appellants in the State of Indiana and Appellees submit that the proper class would be all appellants in public lawsuits. All remonstrators in public lawsuits are subjected to the same procedural safeguards and therefore no denial of the Equal Protection Clause occurs. See *Ortwein* v. *Schwob*, 410 U. S. 656, 35 L. Ed. 2d 572, 93 S. Ct. 1172.

Appellants cite the case of *Warren* v. *Indiana Telephone Company*, 217 Ind. 93, 26 N. E. 2d 399 (1940) as authority for the proposition that they are entitled to judicial review. The Indiana Public Lawsuits Act provides Appellants with review of the decision of Clay Community Schools and the orders of the Indiana Board of Tax Commissioners. Judicial review occurred with the four-day hearing before the trial court and the opportunity to show cause before the Indiana Court of Appeals. Appellants' real complaint is that their case was so unsubstantial that the Indiana courts dismissed same after opportunity was given Appellants to present whatever evidence they so desired.

As a corollary issue, Appellants assert that it would be impossible for them to post a bond in the Clay Community Schools case of $926,610.00. Appellants have cost Clay Community Schools in excess of $1,000,000.00 by this litigation and complain to this Honorable Court that they should not be required to protect Appellees' interest in this patently insubstantial appeal. As discussed above, the validity of bonds to pursue appeals has previously been established by this Honorable Court in

Lindsey v. *Normet, supra.* It is not a denial of due process rights to impose a bond which appellants cannot afford if the bond bears a rational relationship to the damages sustained by appellees.

Appellants complain that their Fourteenth Amendment rights have been violated because the Indiana Court of Appeals and the Indiana Supreme Court did not give a statement in writing of each question arising in the record when they dismissed the appeal and denied transfer. The dismissal occurred pursuant to the Indiana Public Lawsuits Act and involved an "order" rather than a "decision". The action was simply dismissed because of Appellants' failure to comply with the procedural requirements for an appeal of a public lawsuit. Indiana procedure does not provide for an opinion upon the denial of a Petition for Rehearing or Petition to Transfer. The dismissal of the appeal for failure to comply with state appellate procedure results in there being no appeal. See *Newman* v. *Gates,* 27 S. Ct. 220, 204 U. S. 89, 51 L. Ed. 385 (1907).

The procedure of the Indiana Court of Appeals and the Indiana Supreme Court in their rulings on Petitions for Rehearing and Petitions to Transfer is substantially similar to the rulings of this Honorable Court in its denial of writs of certiorari or dismissals. No written opinion need be given. Certainly the only real question presented before the Court of Appeals or the Supreme Court of Indiana was whether the Court of Appeals pursuant to the Indiana Public Lawsuits Act could require the posting of bond as a condition precedent to an appeal. No new questions were presented to said courts requiring a written opinion.

Appellants attempt to raise a Federal question by mentioning the alleged number of Appellants in this appeal along with an alleged comparison of the cost of the school project and the assessed valuation of the county. Appellants assert that they represent a great number of taxpaying remonstrators. This is reflective of how appellants have arbitrarily manufactured facts

in this litigation. The evidence before the trial court showed that only two persons objected to the lease agreement at the June 3, 1977, public hearing before the Board of Trustees of Clay Community Schools. Further, only sixteen persons spoke against the lease agreement at the public hearing before the State Board of Tax Commissioners and thirty-two persons spoke for the agreement. The number of Appellants mentioned in this appeal is based upon a petition circulated in 1974 which has no bearing on the lease agreement of June 3, 1977, the subject of this litigation. The Appellants imply the costs of the building project is Forty-four Million Dollars ($44,000,000.00), but the evidence before the trial court established that the maximum lease budget is Eighteen Million Eight Hundred Fifteen Thousand Dollars ($18,815,000.00). The Appellants misrepresent the assessed valuation of Clay Community Schools' taxing district. These factual distortions demonstrate their resort to completely unfounded accusations to accomplish their goal of delay and eventually the termination of the lease agreement due to increased construction costs. Obviously, these inaccurate representations of Appellants have no substantive value and accordingly, raise no substantial Federal question.

CONCLUSION.

Clay Community School Building Corp. by and through their attorney of record has advised counsel for Appellee, Clay Community Schools, that it concurs completely with this Motion to Dismiss.

For all of the foregoing reasons, Appellees move that this appeal be dismissed, or in the alternative if the papers filed herein are treated as a writ of certiorari, that said writ be denied.

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APPENDIX I.

IN THE CLAY CIRCUIT COURT.

1977 Term.

STATE OF INDIANA } SS:
COUNTY OF CLAY }

SARAH A. ARTHUR, et al., *Plaintiffs,*

vs.

CLAY COMMUNITY SCHOOLS, et al., *Defendants.*

Cause No. CV-77-207

FINDINGS OF FACT AND CONCLUSIONS OF LAW.

Comes now the Court on the "Motion to Dismiss" of the Defendants, and the hearing being held thereon on October 24, 25, 26, and 27, 1977, and evidence being heard and taken, and the Court having considered such evidence and being duly advised in the premises, hereby makes the following findings of fact and conclusions of law:

1. This action is a "public lawsuit" brought under the provisions of IC 34-4-17. The Defendant Clay Community School Building Corp., a privately owned school building corporation that has entered into a lease with the School Corporation pursuant to the provisions of IC-21-5-12, are both "municipal corporations" as defined in the aforementioned statute. Carlton L. Phillippi, Taylor I. Morris, Jr., and Durwood S. Strang are the members and constitute the Indiana State Board of Tax Commissioners, a duly organized and existing agency under the laws of the State of Indiana. This action is a "public lawsuit"

because it brings into question, directly or indirectly, the validity, location, wisdom, feasibility, extent or character of construction, financing and leasing of a public improvement by the Defendant Clay Community Schools, and seeks to enjoin such construction and financing. Plaintiffs sue in their individual capacities as citizens and taxpayers of the Defendant Clay Community Schools and bring this action on behalf of all others similarly situated. This action is a class suit, inasmuch as it is a public lawsuit under the aforementioned statute, binding on all residents and taxpayers in the Clay Community Schools territory as provided in the aforementioned statute.

2. The Defendant Clay Community Schools has had under consideration for several years a school building and remodeling program which it deemed necessary to upgrade its educational facilities. This program involves the construction of a new senior high school, southwest of Brazil, Indiana, and the expansion and remodeling of the Clay City High School; the construction of a new elementary school at Clay City; the expansion and/or remodeling of the Van Buren Junior High School, the Brazil Junior High School and the Staunton Junior High School.

3. Prior to any formal action of the Board of Trustees to adopt a specific building program, as many as 12 to 15 public meetings were held, the purpose of which were to discuss the various alternative plans for the building program. These meetings were attended in part by at least 3 of the present members of the Board of Trustees and the reactions from the public were varied.

4. The first official action of the Board of Trustees to adopt a specific building plan, including new construction and renovation, came on July 3, 1974, by resolution of the Board. In addition to the public reaction from meetings and discussions held prior thereto, the Board possessed the following reports and studies which were considered in reaching their decision:

a) A Cooperative Study of the Clay Community Schools Corporation prepared by the Indiana State University

Bureau of School Administrative Services dated June, 1968, under the direction of Dr. John C. Hill.

b) The Report of the North Central Association Visiting Committee on the Brazil Junior and Senior High Schools, dated November, 1969.

c) The Curriculum and Facilities Study for Clay Community Schools High School Area submitted by former Superintendent of Schools, Dr. A. M. Bennett, in 1971.

d) In June, 1973, Mr. Glen Munro, Superintendent of Schools presently, commenced preparation of a curriculum and facilities study entitled "Student Survey Data," dated March 5, 1974. This Study is a student residence survey made by grade level from which determinations were made as to growth patterns, student growth rates, and the present attendance patterns. The Study evaluated all the Schools, stated their insurance values based on replacement costs less depreciation, surveyed the number of students by the square mile and contained future projections of student movement.

5. The adoption by the Board of Trustees of a specific building program created considerable opposition by the citizens and taxpayers effected due to the proposed closing of two of the existing high schools, Staunton and Van Buren. Petitions were presented to the Board on August 13, 1974, bearing the signatures of hundreds of said citizens and taxpayers. There were also 15 additional public meetings and 4 public hearings held at which citizens were afforded an opportunity to express their views. As a result, at the Board meeting on November 21, 1974, the Board voted unanimously as follows:

> That after holding fifteen public meetings and having carefully considered factors such as finances, transportation, educational need and public opinion, the Board of School Trustees of Clay Community Schools initiate the following:

1. An analysis of cost and education feasibility of: constructing one high school grades 9-12 north of I-70 to replace Staunton, Brazil and Van Buren; remodel Brazil Junior High grades 7-8; remodel and/or construct facilities for junior high schools at Van Buren and Staunton and improvement of 7-12 facilities at Clay City; and construct a new elementary K-6 facility at Clay City.

2. An analysis of cost and educational feasibility of constructing a new high school grades 9-12 to replace Brazil and Staunton; retain and improve Van Buren High School; remodel Brazil Junior High grades 7-8; remodel and/or construct facilities for a junior high school at Staunton and improvement of 7-12 facilities at Clay City; and construct a new elementary K-6 facility at Clay City.

3. An analysis of cost and educational feasibility of constructing two new high schools 9-12 to replace Brazil, Staunton and Van Buren; remodel Brazil Junior High grades 7-8; remodel and/or construct facilities for junior high schools 7-8 at Van Buren and Staunton and improvement of 7-12 facilities at Clay City; and construct a new elementary K-6 at Clay City.

4. An analysis of cost and educational feasibility of remodeling and/or constructing facilities for Van Buren 7-12, Clay City 7-12, Brazil Senior High 10-12 and Brazil Junior High 7-9; and construct a new elementary K-6 facility at Clay City.

6. Since November 21, 1974, the Board of Trustees of Clay Community Schools have appointed various committees, have received numerous studies and reports, both in writing and orally, and have considered same in arriving at their decision upon the final building plan in dispute in the case at hand. Of those are the following:

a) An Educational Specifications Committee made up of teachers and staff submitted a written report for consideration to the Board in late 1974.

b) A 13 person site and finance committee composed of school administrative personnel and interested citizens appointed on September 5, 1974, reported to the Defendant Board of School Trustees on August 28, 1975, recommending seven possible building sites, listing acreage. One of these recommended sites was later chosen as the new high school site.

c) The Educational Architectural Feasibility Study was submitted by James Associates, school architect, in February, 1975. Its assignment was to examine the feasibility and cost analysis of six school building options. When the study was completed, the architect recommended Option "A" which is basically the current building program. A cost analysis was also included in this study.

d) In February, 1975, a Public Advisory Committee of citizens was appointed by the Board of Trustees to study other possible building options and the available means of financing the programs considered. The Committee reported to the Board on May 1, 1975, recommending the Building Program then referred to as "Option A" which is essentially the present plan in dispute.

e) In May, 1975, by unanimous vote, the Board of Trustees agreed to hire an independent consultant with the assistance of the School Architect in selecting same. Dr. Dwayne Gardner was selected and submitted 2 (two) oral reports to the Board in 1975 and an updated written report in January, 1977, relative to enrollment projections and space requirements.

f) Additional written reports were prepared and submitted to the Board relative to the Home Economics Departments and High School Graduation Requirements.

g) At the request of the Board of Trustees by resolution in August, 1975, James Associates Architects and Engineers, Inc., submitted to the Board a Proposed Building Pro-

gram Schematic Design Phase Report, on November 6, 1975.

7. In determining its building program, the Defendant Board of School Trustees also had available to it data and information concerning, among other things, estimated tax rates, the cost of maintenance of the new school buildings, new school acreage, new bus routes, cost of transportation, the replacement or insurable value of existing buildings, the present condition and usability of existing buildings, student-teacher classroom ratios, student enrollments and building capacities, and the means and methods of controlling student behavior, including the new high school having a closed campus rather than an open campus as at the existing Brazil High School, to give school authorities more control over student behavior.

8. Prior to the execution of the lease now in effect, all approvals required by State law from various State agencies had been received and various regulatory authorities in Clay County and Brazil, Indiana, had been consulted, including among them; State of Indiana Administrative Building Council, State Department of Fire Marshal, State Board of Health, State Division of School House Planning, Brazil City Planning Council, Brazil Fire Department, Brazil Police Department and Clay County Sheriff Department.

9. An understandable matter of concern to all taxpayers effected by the proposed building plan is that future tax rate increases resulting from said plan. The Board of Trustees considered this matter and was presented with written analysis of estimated tax rates for future years.

10. The evidence was uncontroverted that on several occasions proposals to finance the building program were considered by the Board of Trustees. The proposals considered included one (1) public holding corporation and three (3) private holding corporations. Subsequent to the receipt of these various proposals, the Board members received and considered written analysis and a Comparative Budget of same.

11. The issue of attorney fees was considered by the Board of Trustees prior to the execution of a fee agreement with the original attorneys involved. Various members of the Board personally investigated this issue and reported their findings to the Board. As many as eight (8) or nine (9) other counties were contacted for comparative purposes and the information shared with all members of the Board. The Dubois County School System which had recently been involved in a building program had been contacted and information obtained therefrom. The reports and information obtained varied and the reasonableness of the present attorney fee agreement was scrutinized by the Board before accepting same and entering into the fee agreement.

12. The building program will be financed in part by school building corporation funds and in part by school corporation funds consisting of a Common School Fund loan and Cumulative Building Fund monies. Although there was evidence the total cash funds required are not now on hand there was no evidence they would not be on hand when required, and investments of Cumulative Building Fund monies, together with refunds due from the Building Corporation for expenses incurred by it on behalf of the School Corporation, and 1978 and 1979 taxes to yet be collected, together with interest, and the Common School Fund loan, are in excess of the cost of the school corporation portion of the building program.

13. By resolution adopted April 7, 1977, the Board of Trustees decided to investigate the possibility of entering into a lease with a "public" school building corporation pursuant to the provisions of IC 21-5-11, but no such lease was ever executed. Although the name of the "public" school building corporation was quite similar to the name of the Defendant Clay Community School Building Corp., the lessor corporation, and there was evidence that some citizens confused the two corporations, there is no evidence that any citizen or taxpayer failed to remonstrate against the lease actually executed on June 3, 1977,

with Defendant Clay Community School Building Corp. because of any name confusion, or that the rights of any of the plaintiffs were adversely affected in any way because of this similarity in names.

14. On May 19, 1977, the Board of School Trustees pursuant to school patron petition determined to hold a public hearing to consider the execution of a lease with the Defendant Clay Community School Building Corp. in accordance with the provisions of IC 21-5-12. Notice of this public hearing was duly published as required by law. Before making this determination, the Defendant Board of School Trustees previously considered several other possible means of financing its building program.

The public hearing was held as advertised by legal notice on June 3, 1977, and at such hearing both proponents and opponents of the proposed lease were heard by the members of the Board. At said meeting the Board determined to enter into the lease in question with the Clay Community School Building Corp., a private holding Company. All Board members had available for their consideration the recommendations, studies and reports heretofore referred to.

15. Notice of execution of the lease dated June 3, 1977 was published as required by law, and notice given that persons objecting to the execution of the lease had the right to file a remonstrance petition and, that if such remonstrance petition was filed, the lease would be reviewed by the Defendant Indiana State Board of Tax Commissioners.

16. After approximately four (4) years of studies, reports, committees, and deliberations, the Board of Trustees executed the lease agreement for the construction of the new building program on June 3, 1977, and pursuant to the law of this State notice of the execution of the lease was published notifying the public of the right to file remonstrances which would require a hearing pursuant to IC 21-5-12-7 before the Indiana State Board of Tax Commissioners. The evidence reveals that such a re-

monstrance was quickly filed in the proper form. The evidence further was that those persons filing said remonstrance were not necessarily opposed to either the building program or the lease that was executed. These persons who signed said remonstrance and testified and the person who circulated the remonstrance stated that their intention was to have the lease reviewed by the State Board of Tax Commissioners and to acquire from said Commission its opinion as to reasonableness and necessity of the lease. The implication from plaintiffs is that the "friendly" remonstrance was a ploy to prevent those against said program and lease from receiving notice of the hearing before the tax commission and thereby deprive them of their right to be heard. A second remonstrance was in fact filed by those against the program and lease within the statutory time allowed. No evidence was presented to support plaintiffs argument.

Before the scheduled hearing before the Tax Commissioners was held, a temporary restraining order was obtained and the hearing was delayed. The hearing was thereafter scheduled and held on July 18, 1977. The Defendant Indiana State Board of Tax Commissioners gave notice by mail as required by IC 21-5-12-7 for the July 18, 1977, public hearing to the persons filing the initial remonstrance and the persons filing the subsequent remonstrance counterparts. There is no evidence the Defendant Indiana State Board of Tax Commissioners or the Defendant School Corporation did not comply in all respects with the statutory requirements contained in IC 21-5-12-7.

17. The lease-rental remonstrance hearing was held in Brazil, Indiana, on July 18, 1977, and was conducted by a hearing examiner of the Defendant Indiana State Board of Tax Commissioners. At said hearing, persons spoke both for and against the executed lease. The hearing examiner found and reported to the State Board of Tax Commissioners that there is a definite need for new high school facilities and that the lease rental agreement is fair and reasonable and that he recommended approval of the lease rental agreement.

18. Thereafter, the Defendant Indiana State Board of Tax Commissioners, by order dated August 29, 1977, and corrected September 6, 1977, approved the lease rental agreement between Defendant Clay Community School Building Corp. and Defendant Clay Community Schools. There is no evidence the Indiana State Board of Tax Commissioners did not act reasonably and lawfully in approving this lease.

19. Subsequent to the conclusion of evidence in this matter the plaintiffs filed a Petition for Relief Under Trial Rule 60. The Court has granted this petition and has allowed additional evidence in the form of affidavits from three (3) members of the Board of Trustees. The additional evidence concerns the receipt by the Board of Trustees of the corrected order of the State Board of Tax Commissioners dated September 6, 1977. The only correction made in said order was the name of the lessor which on the first order had been incorrectly shown as Clay Community School Building *Corporation*. There has been no evidence presented that the Board of Tax Commissioners was confused as to whether the lessor was a public or private holding company.

The importance of the State Board of Tax Commissioners Order, in addition to its findings, is that it was issued by the Commission. The legality of the nature by which the Board of Trustees received said corrected order is not at issue in this cause.

20. The scope of inquiry of a public lawsuit of this nature is specifically limited by IC 34-4-17-8(c) to only those issues raised at public hearings referred to within that statute. This Court, however, allowed the presentation of evidence on all issues which the plaintiffs desired to raise relative to the adoption of the building plan and the implementation of said plan. This Court has also made findings of fact as heretofore set forth on those issues.

A substantial amount of evidence has been heard and presented relative to the building plan and the financing of the plan, the studies, reports, investigations, inquiries, public meetings,

formation of committees, hiring of an independent consultant, various options, considered and the opposition to the Boards' actions.

Questions have been raised and argued on many issues, but particularly in regard to the attorney fee agreement, the Boards' failure to respond to public reaction in opposition to the plan, the estimated tax impact and ability to finance the projects.

In light of the evidence of the actions of this Board of Trustees since they first began considering options for a building program and evidence of the methods and legal procedures followed to implement said plan, this Court can *not* find that the Board of Trustees has acted unreasonably without consideration and in disregard of the facts and circumstances or that their actions were taken without some basis which would lead a reasonable and honest man to take such action.

The decisions and actions of the Board of Trustees when adopting and implementing such a program with such broad-reaching effects has raised questions. The evidence, however, does not convince this Court that the Defendant Board of Trustees acted arbitrarily or capriciously in adopting the building program or that said Board of Trustees, Defendant Clay Community School Building Corp. or Defendant Indiana State Board of Tax Commissioners acted in an arbitrary and capricious manner in entering into the lease-rental agreement on June 3, 1977, and approving same by order on September 6, 1977. The plaintiffs have not raised a substantial question on these issues and have failed to meet their burden of proof.

21. There is an issue raised in this matter simply by the number of citizens who have voiced opposition to the building program by signing petitions and remonstrances and who have voluntarily joined as Plaintiffs in this cause of action. Although no exact numbers have been presented, as many as 5000 people may have opposed the program by some personal action. The evidence reveals an estimate of between 15,000 and 16,000 taxpayers of this community who will be directly effected tax

wise by this program. The numbers alone in opposition raise a question about the reasonableness of the Board's action. However, the evidence shows that the Board responded to the reactions of the public in opposition by considering at least six options and having various options studied by the architects and Advisory Committee. In the end, all recommendations pointed to the program first adopted in 1974. These facts do not support the Plaintiff's contention that the Board ignored public reaction. The fact that the Board of Trustees eventually adopted a building plan to which there was opposition from perhaps as many as 5000 people does not in itself raise a substantial question or support the contention that the Board acted in an arbitrary and capricious manner.

22. Construction of the new building program has not commenced because of the pendency of this lawsuit brought by the petitioners in this cause. Defendants will not be able to commence construction until such time as this lawsuit is finally disposed of and the legality of the actions of the public officials finally determined. However, during this period of delay, the uncontradicted evidence shows the costs of construction have risen and will continue to rise. For example, from January 29, 1977 to September 1, 1977, a period of eight (8) months, construction costs alone for the building project, for both the Defendant Clay Community Schools and the Defendant School Corporation, have risen $509,578.

23. The uncontradicted evidence shows that if the lawsuit had not been filed, construction would have started following the approval of the lease by the Indiana State Board of Tax Commissioners, subject, however, to rebidding the School Board portion of the work. Construction would have commenced by November 1, 1977, at the latest. The uncontradicted evidence shows that a period of five months, or until April 1, 1978, is a reasonable estimate of the time required to conclude a lawsuit of this nature, and any attendant appeal. Based on written commitments received from contractors who have obligated themselves to construct their portion of the work at a prescribed figure set forth in the evidence, construction costs will increase $359,669 from November 1, 1977, to December 31, 1977; an additional $276,708 from January 1, 1978, to February 28, 1978; and an additional $290,233 from March 1, 1978, to April 1, 1978.

24. The uncontradicted evidence shows that the cost to construct the school building program, if commenced by November 1, 1977, would increase $926,610, if construction is delayed until April 1, 1978.

For the reasons aforesaid, the Court states as its conclusions of law:

1. The Plaintiffs have failed to sustain their burden of proof and establish facts at the hearing in this cause which would entitle them to a temporary injunction, and have failed to show that there is a substantial question to be tried that is proper for investigation by a court of equity.

2. The motion of the Defendants for an order of the Court in this case that this lawsuit should be dismissed unless the Plaintiffs shall post a bond with surety to be approved by the Court, should be granted.

Entered this 14th day of November, 1977.

/s/ DAVID K. JOHNSON
Special Judge, Clay Circuit Court